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CURRENT TOPICS

New Year Honours

THE legal profession is well represented in the New Year Honours List, and we note with pleasure the names of a number of solicitors among those honoured by Her Majesty. The K.C.V.O. is conferred on Mr. IRVING BLANCHARD GANE and the K.B.E. on Colonel DOUGLAS STEPHENSON BRANSON, while Mr. AMOS BROOK HIRST and Brigadier ARTHUR MAXWELL RAMSDEN become knights bachelor. Recipients of the C.B.E. include Mr. C. P. BRUTTON, Mr. P. B. DINGLE, Mr. C. S. HALLINAN and Mr. C. F. PENRUDDOCK, and Mr. J. H. WARREN is awarded the O.B.E. A fuller list of the legal honours which have come to our notice appears on p. 24, *post*.

Estate Duty on Gifts Inter Vivos

A SUPPLEMENTAL statement approved by the Board of Inland Revenue has been published in the *Law Society's Gazette* for January, clearing up certain points raised by members on the statement in the September issue (and 97 SOL. J. 529) relating to estate duty and gifts *inter vivos*. The broad effect of the Board's ruling, the statement says, is that where property given to a donee absolutely has been sold between the date of the gift and the date of the donor's death, the measure of liability to estate duty will *prima facie* be the proceeds of sale, and it is only where investments or property can be identified as representing such proceeds that the claim for duty will shift from the proceeds to the identifiable investments or property. In neither case will there be a claim on the property originally given. The donee does not have an option to pay duty either on the property or on the proceeds of sale. If the property is sold during the donor's lifetime the claim will *prima facie* attach to the proceeds of sale, but not if such proceeds were at the date of the donor's death represented by identifiable property or investments, in which case duty will attach to such property or investments to the exclusion of the property originally given and of the proceeds of sale. No protection is given by the Board's statement to a mortgagee, who can be held accountable for estate duty if the donor dies within the five years' period. The right to recover from the mortgagee is treated as a last resort, as the Board look primarily to the donee, but they can give no assurance that they would never call on a mortgagee for payment. The *Gazette* adds that the Council are pressing for the extension of the protection to cover mortgagees, and have included this matter in their memorandum submitted to the Chancellor of the Exchequer in November on estate duty anomalies.

Redemption of Land Tax

THE land tax on certain properties is compulsorily redeemable on 1st January, 1954, as provided by s. 39 of the Finance Act, 1949. Drawing attention to this, a notice issued by the Inland Revenue states that the properties affected are those owned on 1st April, 1950, by a corporate or unincorporated body of persons or the sole trustee of a trust established for charitable or public purposes only, and that the owner for redemption purposes means the lessee under

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a head lease which had not less than fifty years to run on 1st April, 1950, or in any other case the freeholder. The expression "corporate or unincorporated body of persons" includes, *inter alia*, limited and unlimited companies, associations, clubs, partnerships, guilds, local authorities and public undertakings. It also includes the trustees of a trust established for charitable or public purposes only. Notice of liability to redemption is required to be given to the Registrar of Land Tax within three months from 1st January, 1954. A form (RLT.1) on which the notice may be given can be obtained from the registrar or the local collector of taxes. A detailed explanation of the compulsory redemption provisions is contained in the Explanatory Notes on Redemption (Revised Edition, June, 1953) issued by the Board of Inland Revenue. A copy of these notes can be obtained from the local collector of taxes, or the Registrar of Land Tax, whose address is Land Tax Redemption Office, Inland Revenue, Barrington Road, Worthing, Sussex.

Public Relations and The Law Society

ON the broad shoulders of the Secretary of The Law Society and his staff are carried many of the duties fulfilled by the public relations officer who occupies a recognised position in modern Government departments and industrial and political organisations. Some newspapers, according to "R.E.P.," writing on "The Solicitors' Profession and the Public" in the January issue of the *Law Society's Gazette*, dislike the "handouts" and Press conferences called to give information rather than to answer questions, which are the stock-in-trade of the public relations officer. On the other hand, as the writer points out, when an agency is remote or unfamiliar it should be "at pains to acquaint the public with the whys and wherefores of operations and attitudes which might otherwise lead to perplexity, irritation and loss of goodwill." The officials of The Law Society, the writer notes, "at present have to find the time and energy to deal with essential public relations tasks in addition to their normal duties." They spend time, for example, in correcting the mistakes of the Press and radio pundits and others who command large audiences. This is necessitated by the absence of a public relations officer, whose supply of positive information would do more to prevent mistakes from gaining currency than isolated corrections of mistakes as and when they may be discovered.

Accountants as Executors

WITHOUT denying the important functions that accountants perform in assisting in the correct distribution of deceased persons' assets, especially where a business is concerned, it is possible to express surprise that any accountant, even if he has passed an examination on executorship law and accounts, should claim to be better equipped than a solicitor for the purpose of acting for or as an executor. Mr. WILFRED TULLETT, a correspondent in the *Accountant* of 2nd January, 1954, using as his text some advice in a circular by a religious body telling members to consult solicitors or accountants with a view to having a will executed, saw in it a "present trend." "For a long time," he wrote, "it has been my practice as a general rule not to draw up wills, and not to act as executor, on the ground that this is work which should be done by solicitors." He said that he was now compelled to change that view, because the public is demanding the accountant's service "because of the accountants' expert knowledge of figures, tax and estate duties and their accepted standing as a profession of known integrity." He believed that "the accountancy profession has now one of its greatest opportunities to expand into this great new field." He thought finally that the actual execution of the will should be done by solicitors, "from whom I believe the accountancy profession would receive complete co-operation." There is, of course, a great deal of co-operation between the professions, but it should never extend to a surrender of functions.

The "Chief"

THE first of a new weekly series of character studies of famous people, in the *New Statesman and Nation* of 2nd January, 1954, is concerned with the life and achievements of the Lord Chief Justice, BARON GODDARD OF ALDBOURNE. His father, as the writer mentions at once, was a solicitor, but the son was called to the Bar at the age of twenty-two, in 1899. His outstanding success at the Commercial Bar and from 1932 onwards on the Bench is properly appreciated, and one gathers from the article that, although the writer disagrees with some of the more controversial opinions held by Lord Goddard, his conclusion is the same as that held by a prominent M.P., Mr. R. T. PAGET, Q.C.: "There has seldom been a finer judge." His "sharp eye for injustice in the lower courts" is exemplified by his direction in March, 1953, that a man who had been given preventive detention for eight years should instead be put on probation for two, because he seemed to have been denied a fair chance of going straight. The writer, although obviously alive to Lord Goddard's reputation for severity, describes this example as typical. He describes Lord Goddard as "a fearless man," "undaunted by criticism" and "uninfluenced in his duties by popular trends." The cartoon by "VICKY" which accompanies the article in our view does the "Chief" less than justice.

The Local Government Legal Society

AT the sixth annual meeting of the Local Government Legal Society, which was held in London on Saturday, 12th December, 1953, seventy-five members heard Sir CECIL CARR, K.C.B., Q.C., LL.D., Counsel to the Speaker, give a talk on delegated legislation. Observing that delegation was by no means novel, he cited an Act of 1388 whereby the Chancellor was authorised to fix the places at which assizes were to be held notwithstanding a previous statute which had named the assize towns specifically. The combined output of general and local orders in any one year had never reached 3,000 and was steadily falling; up to the first week in December of 1953 there had been 320 fewer orders than in 1952. He recalled the following advantages for subordinate legislation: (*a*) action could be taken quickly in an emergency; (*b*) the time of the House could be saved; (*c*) Acts could be disencumbered of details; and (*d*) details could be left to experts. On the other hand there must be misgivings if, under the influence of emergencies, the delegation was so unrestricted as to exclude judicial control by way of *ultra vires*. The guests included Members of Parliament and representatives of The Law Society, the Society of Town Clerks, the Society of Clerks of Urban District Councils, the Civil Service Legal Society, the Association of Municipal Corporations, the County Councils Association and the Urban District Councils Association.

The Annual Conference

IT has been decided, the *Law Society's Gazette* for January announces, to hold the 1954 Annual Conference of The Law Society at Folkestone from 20th to 24th September. Provisional arrangements have been made for an informal reception on Monday, 20th September, and for the conclusion of the work of the conference on 23rd September. Full details are to be circulated later.

BEQUEATHING BODIES FOR DISSECTION

In order to learn about the structure of the body the medical student, before he starts his studies in the wards, must dissect the human body. There is no substitute for this practical work, and it is desirable that dental students should also at least dissect the parts with which they are concerned—the head and neck. The supply of subjects for dissection has never been plentiful. Legislation provided that the bodies of persons executed should be used, but this never was an adequate source, and in fact had the unfortunate effect of making ordinary people regard dissection for medical teaching as something horrific. The only way an adequate number of bodies could be obtained in the early nineteenth century was by robbing graveyards. The scandal of this was reinforced by the enterprise of Burke and Hare in Edinburgh and an imitator in London, who created corpses artificially to obtain the money for selling bodies to medical schools without taking the trouble to dig up graves; and at last, following a report by a select committee, Parliament passed the Anatomy Act of 1832. This Act governs the position at the present time (the amending Act of 1871 merely relates to the period within which certificates of interment for bodies which have been dissected are to be transmitted to the Inspector of Anatomy).

The Act stopped the dissection of executed criminals as part of their sentence. It made it possible for unclaimed bodies in hospitals and institutions to be supplied for dissection. It also provided that a person might ask for his body to be used for this purpose—an example in this respect was set by the law reformer, Jeremy Bentham, who died in 1832.

Section 7 of the Act made it lawful "for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment," to permit the body to undergo anatomical examination "unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination." Section 8 makes provision for a person to direct that his body should be dissected. The request may be made in writing at any time during the deceased's lifetime or verbally during the last illness, in the presence of two or more witnesses. If a person in this way "shall direct that his body after death be examined anatomically, or shall nominate any party by this Act authorised to examine bodies anatomically to make such examination, and if, before the burial of the body . . . such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorised and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being kin in the same degree, shall require the body to be interred without such examination."

"Our law recognises no property in a corpse," said Erle, J., in *R.* v. *Sharpe* (1857), Dears. & B. 160, at p. 163. But clearly it was the Legislature's intention to enable a man to direct that his body be used for medical teaching purposes, and subject to the provisos in the section quoted, it would appear to be a duty on the person having charge of the body to carry out his wishes, whatever that person's own views might be. Kay, J., however, held in the case of *Williams* v. *Williams* (1882), 20 Ch. D. 659 (which was not concerned with the leaving of a body for dissection, but a direction that the body should be disposed of in a certain way, the executors paying expenses of such disposal—the Anatomy Act was not mentioned): "... The law in this country is clear, that after the death of a man his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried. It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of" (20 Ch. D., at p. 665). Although this is clearly contrary to the intent of s. 8 of the Anatomy Act, 1832, and has not been challenged in relation to it, the difficulty is fortunately more academic than practical.

A case which concerned the Anatomy Act was that of *R.* v. *Feist* (1858), 8 Cox C.C. 18. The Master of Stoke Newington Workhouse had shown the bereaved their relatives' corpses reposing in coffins. The mourners afterwards followed the coffins to the graves, little realising that after they had seen the corpse it was removed and sold to Guy's Hospital for dissection and that they were being tricked by an empty coffin. The Master was indicted on three counts concerning the selling of the bodies. The case was reserved and in the appeal court the indictment was not sustained as the Master had lawful possession of the bodies under s. 7 of the Anatomy Act, 1832, and the relatives had made no request that the bodies should be interred without anatomical examination. Bramwell, B., said: "... The Act seems to say that the relatives shall have an opportunity of requiring burial [without dissection] and for this purpose they must have a reasonable time to do so ... A reasonable time would be a time not longer than that which ought to intervene between the death and burial ..." (8 Cox C.C., at p. 24).

It need hardly be said that such sharp practices to obtain bodies are not customary to-day. Before the National Health Service, the responsible official in charge of any institution or hospital was regarded as being "in lawful possession" within the meaning of the Act and was enabled to help the medical schools provided he had not received contrary instructions from his authority. Many local authorities sanctioned the practice. When the Health Service came into operation, officials were uncertain of their powers and in general were unwilling to make subjects available until approval had been obtained by a responsible committee. A circular letter was sent to hospitals by the Inspector of Anatomy urging them to co-operate in "dealing with a matter which vitally affects the future of medical education."

In fact, for various reasons, the supply of bodies from hospitals and institutions has been falling off for many years. It has not been as much affected by the Health Service as might be supposed. The supply from such sources, however, would to-day be insufficient. But fortunately there has been a steady increase in the number of bequests over the last four or five years. Whereas in the academic year 1937–38 only twenty-seven bodies were received in this way, the figure has been mounting since 1942–43, and particularly since 1946–47. 1951–52 showed a further improvement even over the previous year—the bodies of 176 adults and three children were obtained in this way. It is interesting that the bequest rate is highest in the London area and lowest in Scotland. The usefulness

of leaving one's body for dissection cannot be over-emphasised. Without these bequests the system of medical education might have broken down, and certainly its efficiency (and therefore the efficiency of future doctors) would have been considerably curtailed. Even so, more bodies are needed. An ideal would be to have one student only dissecting each "part" (arm, leg, etc.), and it is generally agreed that there ought not to be more than two to a part, but in practice, since the 1914–18 war, there have had to be three or even four students to a part in some medical schools, whilst in London dental students taking the L.D.S. diploma do not have an opportunity to dissect at all.

Two points should be emphasised with regard to leaving bodies for dissection. The first is that it is in fact providing for delayed burial, since all bodies are buried. Many people do not realise that the body is interred after dissection, with a service conducted by a clergyman of the faith which the deceased professed during life, and the burial certificate, signed by cemetery officials, with full information as to the date of burial, the number of the grave and the name of the clergyman is sent to the Inspector of Anatomy, who transmits this information to the person who signed the original notice that the body was available for dissection. The second point is that this method saves the deceased's family a great deal of money. All expenses of removal and burial are borne by the medical schools, although they are only, of course, able to provide a simple funeral. (It should be pointed out to clients who hold the Cremation Society's guarantee of free cremation that this does not cover the cost of sending the body to the crematorium, which would have to be borne by the deceased's estate or his relatives.)

The individual who desires that his body should be used for medical teaching should understand that the legal right to dispose of his body after death rests with the executor, next of kin or other party in whose custody it may be at the time. Further, it can only be sent to a medical school for anatomical examination in the absence of any objection from any near relative. For the guidance of such persons, the individual making such a bequest should leave a written statement of his desire, either in his will or separately. It is helpful if the individual or his solicitor will inform the Inspector of Anatomy, Ministry of Health, Savile Row, W.1 (in Scotland the address is the Anatomy Office, St. Andrew's House, Edinburgh), of the bequest when it is made. The Inspector will supply the form of medical certificate and notices to be sent by the executor or next of kin after death, for the collection of the body. This collection is carried out reverently and without bother to the bereaved. It is possible to leave a body to a specific medical school, and such a request would, of course, be respected. But it is preferable that the medical school should not be named. The body will then be taken to the nearest school or sent where there is a shortage. The Inspector of Anatomy will be pleased to furnish, on application, details of the procedure and a copy of the Anatomy Acts, 1832 and 1871.

Nowadays a dead body may not only benefit humanity through medical teaching. The cornea taken from the eye of a dead person can give sight to a living person who has a certain form of blindness. The provisions of the Corneal Grafting Act, 1952, follow broadly the Anatomy Act, 1832, in so far as the directions by the deceased are concerned. If any person, either in writing at any time, or orally in the presence of two or more witnesses during his last illness, has expressed a request that his eyes be used for therapeutic purposes after his death, the party lawfully in possession of his body may (not "shall" as in the Anatomy Act), unless he has reason to believe that the request was subsequently withdrawn, authorise the removal of the eyes from the body for those purposes. Also a party having lawful possession of the body of a deceased person may authorise the removal of the eyes from the body for the purpose unless that party has reason to believe that the deceased had expressed an objection to his eyes being so dealt with after his death, and had not withdrawn this objection, or that the surviving spouse or any surviving relative of the deceased objects to the deceased's eyes being so dealt with. No removal of the cornea may be carried out except by a registered medical practititioner, who must be satisfied by personal examination that life is extinct.

In practice the eyes must be removed within hours of death by a doctor with ophthalmic experience, and therefore, immediately death takes place, the nearest appropriate hospital should be informed. The practititioner attending at death will probably know which hospital is an appropriate one, or any local hospital could advise. The eye hospital makes all the arrangements. Under the Act, authority for the removal of the eyes is not to be given in cases where the party having lawful possession of the body has reason to believe that an inquest may be required to be held on the body, or, in Scotland, where the Procurator Fiscal has objected to such removal.

It is suggested that a person desiring his eyes to be used in this way should make a simple signed statement in the following form :—

> I, (*full name*), request that after my death my eyes be used for therapeutic purposes.

He should see that a copy is given to his relatives or the people with whom he lives, and his executors, if any. If a person goes to hospital, he should inform the hospital authorities, who can then make the necessary arrangements in the event of his death.

A client may desire both to leave his eyes under the Corneal Grafting Act and his body for dissection. The arrangements under the former Act are not the responsibility of the Inspector of Anatomy, but provision can be made, and in the Liverpool area, for example, the Professor of Anatomy has established liaison with the local eye hospital.

Finally it may be remarked that the belief is still common that one can, whilst still living, obtain money for one's body after death. It is a misapprehension, of course. But every professor of anatomy still receives hopeful inquiries.

L. D.

The Lord Chancellor has appointed Mr. CHARLES EDGAR CULLIS, solicitor, of London, S.W.1, to be a taxing master of the Supreme Court.

The Lord Chancellor has appointed Mr. EDWIN ARTHUR EVERETT to be the Registrar of Bow County Court, as from 1st January, 1954, in succession to Mr. K. P. D. Thomas.

Mr. W. H. TEE, junior assistant solicitor since February, 1953, has been appointed senior assistant solicitor with West Bromwich Corporation.

The Lord Chancellor has appointed Mr. CHARLES PETER STANLEY LIGERTWOOD to be the Registrar of Taunton, Bridgwater and Minehead County Courts and District Registrar in the District Registry of the High Court of Justice in Taunton and Bridgwater as from 1st January, 1954, in place of Mr. H. G. D. Moger.

Mr. HAROLD RACE has been appointed clerk to Durham county and city magistrates as from 1st January, 1954, in place of Mr. Allan Luxmoore.

A Conveyancer's Diary

ADVANCEMENT BETWEEN HUSBAND AND WIFE

WHEN I was recently looking through the cases reported during the last twelve months, with an eye to the review of the year 1953 which appeared in this Diary last week, I came across one which, I remembered, I had intended to discuss in an article at the time when it was first reported, but which I subsequently overlooked. This was the case of *Anson* v. *Anson* [1953] 1 Q.B. 636; 97 SOL. J. 230, and there are two reasons why this omission should be rectified even at this late date. In the first place the subject-matter, a dispute between husband and wife after the dissolution of the marriage arising out of certain financial arrangements made between them during the subsistence of the marriage, is an important one, for the number of disputes of this kind has very naturally increased with the increase in the number of divorces granted, while the number of reported authorities available as guides for the solution of these disputes has remained very small. Any reported decision on this kind of problem is, therefore, a matter of some importance for the property lawyer at the present time. And in the second place, this decision tends to bear out something which I said in this Diary some two or three years ago when I was discussing *Jones* v. *Maynard* [1951] Ch. 572, and it is always very gratifying for a writer of periodical notes like these to have any observations of his confirmed, even if indirectly, from the Bench.

After discussing the particular decision in *Jones* v. *Maynard* I wrote (see 95 SOL. J. 442) that the purchase by a husband of a house or other property of permanent value in the joint names of himself and his wife was quite a different transaction from the opening of a joint banking account in the names of the two spouses, even if the funds with which the account is opened and later fed were all provided by the husband, for the former transaction could only be inspired by the husband's desire to advance the wife, while the motive behind the latter might be no more than a desire to make a convenient arrangement for the payment of household expenses for which the husband would on any footing be responsible. The former case, it seemed to me, was a classic example of the kind of case which could be decided on the basis of a presumption of advancement, since no other motive could be discovered to explain the transaction, but it was at least arguable that there was no room for the application of any presumption in the other case, where a reasonable motive for the transaction could be found without resort to any presumption.

The facts and the decision in *Anson* v. *Anson* afford an example of this latter kind of case. A husband, who had a personal banking account at a country branch of a bank, opened an account at that branch in his wife's name and provided £100 for this purpose. The wife, who had means of her own, already had, and at all material times maintained, another banking account at a bank in London. It was intended that the banking account opened by the husband in his wife's name should be primarily a housekeeping account, out of which she would pay housekeeping bills relating to the matrimonial home, and in fact this account was so used. The husband made the wife a very large allowance, amounting to over £7,000 in the year 1947, but he made no express appropriation for housekeeping purposes; he did, however, apparently expect her to keep the account which he had opened for her in a proper state. In fact, out of the allowance made to her in the year in question, the wife paid something under £500 into the housekeeping account, the remainder being paid into her personal account in London. The housekeeping account became overdrawn, and after some confused and confusing discussions between the parties the husband, at the clear request of the wife, entered into a written guarantee of the housekeeping account to the extent of £500. In 1949 the parties were divorced, and in 1950 the bank demanded payment from the wife of the debit balance due in respect of the housekeeping account, which was then again overdrawn, and when the wife refused to pay, demanded payment from the husband under his guarantee. The husband paid £500 in discharge of his liability under the guarantee, and in the action which is reported claimed this sum from the wife as money paid under a guarantee entered into at her request. To this claim the wife put forward a number of defences, of which one only is relevant to the subject under discussion, viz., that the transaction was in the nature of an advancement to her by the husband which she was under no liability to repay.

Pearson, J., found as a fact that the housekeeping account was the wife's account and that she was primarily liable to repay the overdraft, and that the husband by giving the guarantee did not, to her knowledge, intend to relieve her of this liability. In these circumstances, if the case were to be treated as an ordinary case of one person guaranteeing another person's banking account, the ordinary rule that the guarantor, having been called upon to pay the debt, was entitled to reimbursement from the principal debtor would apply, unless some special defence could be established on the facts of the case, which included the important fact that at the material time the parties were husband and wife. That being the general position, the learned judge mentioned some of the defences raised, including that of advancement, and in relation to this defence observed that the theory of advancement was not very easy to apply to the case of a bank guarantee, because the presumption normally arises when the husband buys property in the wife's name, that being the normal use of the word "advancement" as between husband and wife, the husband being then presumed to have intended a particular sum to become the wife's property as a gift from him. When the theory of advancement was applied to the case of a bank guarantee, it had to be understood as meaning that the intention was that the husband should not have a right of reimbursement; and for advancement to be presumed in such a transaction it would have to be interpreted as a transaction of a very special character in that, although the husband gives the wife a guarantee, there is a special arrangement, express or implied, between the parties whereby the husband is expected to bear the liability and is not expected, if he is called upon to pay and does pay the debt, to claim reimbursement.

Some authorities were then examined in which the nature and origin of the guarantor's right of reimbursement were considered, and which show that in the normal case where a guarantee is given at the request of the principal debtor the right of reimbursement is of a contractual character, arising from a contract implied in the request for a guarantee. It would thus appear to be open to a guarantor and a principal debtor to make some special arrangement of the kind contended for by the wife in the case under review, and the question was whether the facts indicated the existence of such an arrangement. This question Pearson, J., answered

in the negative. He referred to the decision in *Re Salisbury-Jones* [1938] 3 All E.R. 459, in which a husband had joined as surety in a mortgage made by his wife and, during her lifetime, had been called upon to repay and had repaid the mortgage moneys. After the death of the wife he sought to prove in her estate as a creditor for the amount so paid by him, but this claim was refused on the ground that the payment had constituted an advancement to the wife. The case for the estate was put in various ways, one argument being that each time the husband had been called upon to make a payment to the mortgagees he was advancing his wife. This argument was rejected as quite untenable: the husband made the payments, it was held, in pursuance of a legal obligation which he was under to the mortgagees, and having done so he had all the rights at law and in equity of a surety who pays off the principal debtor's debt.

That, in the view of Pearson, J., was the position in *Anson* v. *Anson*. A case was conceivable, as between husband and wife, in which the right of reimbursement might be excluded by express or implied agreement between the parties when the guarantee was given, but the facts in the case before the court justified no such implication; indeed, they pointed the other way. There had never been any intention on the husband's part to relieve the wife of her debt entirely; if he had meant to do so he would have done it directly by a payment into the housekeeping account. The ordinary position as between surety and principal debtor therefore applied, and judgment was given for the husband for £500.

It seems to me that the principle of this decision is applicable equally in the simpler case where a husband opens a joint banking account in the names of himself and his wife and provides the funds for this account. If the marriage is dissolved and a dispute arises as to the rights of the parties to the moneys standing to the credit of the account it would, I think, be too facile simply to apply the doctrine of advancement and declare that the interest of the parties in the account is a joint interest in equity as well as at law. The proper approach is to examine the motives of the parties at the time when the account is opened. That was what was done in *Anson* v. *Anson*. If the facts indicate that the opening of the account was prompted merely by considerations of convenience in the running of the matrimonial home, there is no necessity to resort to any presumption of fact in explaining the motives of the parties: the facts, on this footing, explain themselves. This kind of problem, as I have said, is not uncommon at the present time, and instances of it which have come within my own experience show that too much emphasis is often placed on presumptions, to the detriment of the husband's position, because it is apparently felt that a considerable weight of evidence is required to displace the presumption of advancement. That is not so. The presumption only arises in the absence of evidence of any other motive which can reasonably explain the transactions in question, and *Anson* v. *Anson* is valuable in showing that this question must be determined, like any other question of fact, on the available evidence. It is only if the evidence before the court is insufficient to provide a reasonable explanation of the transaction that resort is made to the presumption.

"A B C"

Landlord and Tenant Notebook

CONTROL: DIFFERENT KINDS OF EXCESS PAYMENTS

Two issues were raised by the defence in *Temple* v. *Lewis* [1953] 3 W.L.R. 762 (C.A.); 97 SOL. J. 760: whether a certain payment was a prohibited premium within the meaning of the Landlord and Tenant (Rent Control) Act, 1949, s. 2; and, if so, whether the right to recover it after two years had elapsed was barred by the Rent and Mortgage Interest Restrictions Act, 1923, s. 8 (2), as amended by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, s. 7 (6).

The action was for possession of a controlled flat and was brought on the ground of rent default. When the plaintiff let the flat to the defendant in 1951 the defendant's son paid the plaintiff, on 3rd May of that year, £200 in consideration of the grant to his father, who was not well off; the son, who was employed by the plaintiff at the time, also undertook to be responsible for the rent. The son left his employment and set up on his own in the middle of 1952 and then ceased paying the rent. In the action the defendant claimed to set off the £200 against the arrears. The counterclaim was dated 17th June, 1953.

Section 2 (1) of the 1949 Act enacts that a person shall not, as a condition of the grant of a tenancy to which the section applies, require the payment of any "premium in addition to the rent." The scope of the section is dealt with in subs. (3), but nothing turned on that. There is no definition of "premium," though s. 18 (2) declares that it includes fines, like sums, etc.; generally speaking, Warrington, L.J.'s "a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained" in *King* v. *Cadogan (Earl)* [1915] 3 K.B. 485 (C.A.) is found a useful basis or starting point. Rent control legislation has, of course, occasioned refinements. The report of *Temple* v. *Lewis* does not mention the nature or length of the term or whether the action was based on forfeiture or was brought against a statutory tenant by virtue of para. (*a*) of Sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. I do not suggest that the information should have been supplied; but if the fact was that the tenancy granted was a weekly or other periodic one, a further point might have been raised, as the payment would not answer to the description given by Warrington, L.J. In my submission it would none the less have fallen within the section, because of the words "in addition to the rent" which occur both in s. 2 (1) and in s. 18 (2). If a sum of money were demanded as the condition of the grant of a periodic tenancy it should satisfy such definition as there is, though it would not represent the capital value of the difference between actual rent and best rent.

The county court judge and the Court of Appeal construed the negotiations which had led to the tenancy as having been conducted by the son on his father's behalf ("You can apply to me for the premium and you will get my cheque") with the result that the payment had been made not by a third person, but by an agent of the tenant on the tenant's behalf. But both courts considered that if the payment had been made by a third person that person would, having regard to the wording of the section, be entitled to recover it. I think that the nearest approach to an actual decision on this point was the case of *Austin* v. *R. & P. Properties, Ltd.* (1951), 101 L.J. News. 179, in which the plaintiff, a married woman, recovered £8 from the defendant company who had

let premises to her husband. The main issue was whether it had been paid to the company or to their "agent," but Judge Engelbach did decide that the plaintiff was qualified by the section.

Discussion of the other point, that of limitation, showed that there was a conflict of opinion between the authors of text-books. The 1949 Act itself makes the premium "recoverable by the person by whom it was paid" (s. 2 (5)) and does not provide any special time-limit. But the statute does make references to "the principal Acts," e.g., in s. 2 (3), and defines that expression, in s. 18 (1), as "the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939." Among these enactments are to be found the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Rent and Mortgage Interest Restrictions Act, 1923, and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938. Of the first-mentioned statute, s. 8 (in fact repealed by s. 2 (7) of the 1949 Act, a circumstance which at one point appears to have escaped the notice of the court) made certain premiums "irrecoverable" and conferred a right to recover them from landlords who had received them; s. 14, headed "Recovery of sums made irrecoverable, etc.," declares that the right of recovery of sums made irrecoverable by virtue of that Act and any Act it repealed is enforceable against mortgagees and legal personal representatives, as well as authorising recovery by deduction from rent; and this would clearly apply to the premiums made illegal by s. 8. No time-limit was prescribed by this Act, but the 1923 Act, s. 8 (2), provided: "Any sum paid by a tenant . . . which, under s. 14 (1) of the principal Act [that of 1920], is recoverable by the tenant shall be recoverable at any time within six months from the date of payment, but not afterwards," and the 1938 Act, s. 7 (6), altered the period to "two years from the date of payment." The court held that the limitation applied only to sums irrecoverable by virtue of that Act (and any Act repealed by that Act) and not to premiums recoverable "under s. 8," as Somervell, L.J., put it; "originally recovered under s. 8 of that Act, and now under s. 2 of the Act of 1949," as Denning, L.J., said.

Whether we are dealing with another *casus omissus* or not is difficult to say; the history of rent control, in particular the vacillation displayed by Parliament in this matter, has shown that that body has sometimes directed its attention to the conflict between the "*interest reipublicæ*" and the "*vigilantibus non dormientibus*" principles; and one may well doubt whether the omission to prescribe any specific period in the case of the 1949 Act—the six years of the Limitation Acts operates, of course—was deliberate.

R. B.

HERE AND THERE

SAN MARINO

SOMETIMES in our more depressed moments we are ready to believe that, the way the world is going, it really will one day emerge into somebody's vast, impersonal Utopia, though whose it is not quite clear. For the moment, even assuming that national wars could be exorcised, there remains almost infinite scope for ever more ferocious wars between different people's rival Utopias, but nevertheless, although certain imperial agglomerations have, of late, been rather seriously chipped, the big still display an unabated appetite for gobbling up the little, alike in business expansion and international politics. So it is that, according to our mood, we look, either with nostalgic indulgence or with a fortified hope for the indestructibility of human personality and its unpredictable differentiations, at such Lilliputian survivors as Lichtenstein, Andorra or Monaco. Not that it does to sentimentalise them as ideal communities; the wise man is not going to be suspicious of Utopianism on a world-wide scale only to fall for its dangerous charms in miniature. The little places, just because they are human, have all the human weaknesses and, like the rest of us, they must live more or less in the idiom of our time, so that even among the intimidating altitudes of the high Pyrenees, pastoral Andorra flaunts an incongruously illuminated shopping centre. But aptest of all at taking the world as it finds it is little San Marino, embedded in Italy but not of it, a craggy height fourteen miles south-west of Rimini, which has maintained a stubborn independence since the fourth century, when its patron saint found in its then inaccessible fastnesses a refuge from Diocletian's persecution. It has withstood the impact of such other contrasting personalities as the Borgias and the Emperor Napoleon and emerged into modern times with a sound claim to be the oldest State in Europe. Nevertheless, it was not until the end of Queen Victoria's reign that Britain discovered San Marino in a diplomatic sense for the purpose of negotiating an extradition treaty, and it was only in 1900 that a British diplomatic mission arrived there.

COMPANY LAW AND ALL THAT

Now, the total territory of San Marino is about a quarter the size of Rutland and, to render its situation, if possible, more Baratarian than one would expect, the constitution provides for twin elected heads of the State, two captains regent. Judged by the test of its improbable survival, this looks like a case where two heads are better than one, for neither economically nor militarily would one be inclined to say that San Marino was likely to prove a going concern. Almost its sole exportable commodity was the excellent stone of Mount Titano, so it has had to invent other means of support, visible and invisible. In the spacious days before the war it was able to rub along fairly happily on philately, constantly changing its issues of stamps, but in these sterner times it has had to discover other means of maintaining its 13,000 inhabitants. With admirable common sense, it has asked itself what pays the best dividends in the modern world and the answer borne in upon it is divorce, company law, motor transport, gambling, Communism and war losses. For several years now it has had a pro-Communist government which has been energetically exploiting all the possibilities visualised. Apart from Yugoslavia, it is the only Communist-controlled government that has applied for aid to the United Nations. It has also presented Britain with a bill for about half a million pounds for alleged war damage at the time when Marshal Kesselring evacuated it and the Eighth Army marched in. The negotiations have set the somewhat novel precedent in international usage of a letter in Latin addressed to Her Majesty The Queen. But that claim is a long-term speculation, and for bread-and-butter revenue it was found more profitable to frame San Marino's laws on motor car registration more favourably than those of Italy. It has not, of course, been the first sovereign State to discover the possibilities of company law as an invisible export, but it has exploited them with gratifying success, attracting about ninety international companies to establish their registered offices there, six of them steamship companies, though San

Marino has no more coastline than Switzerland and considerably less water. Running a casino is, of course, almost common form. Its establishment was San Marino's equivalent of the Irish sweep.

DIVORCE INDUSTRY

ALL this, besides being good for revenue, has very high nuisance value in annoying the Italian Government. But for both purposes the divorce law as manipulated in San Marino shows even greater promise. Italy, like Ireland, is not a divorcing country and San Marino has seen and seized the opportunities of local scarcity by turning itself into a sort of Italian Reno, simply replying to all protests that it is entitled to frame its marriage laws more liberally than those of its neighbour. Lately this has apparently had some rather peculiar repercussions, for certain Communist leaders in Italy, not feeling themselves morally bound by laws framed in a spirit alien to their convictions, have been availing themselves of the laws kindly provided by their comrades in San Marino to change their matrimonial status. Italian law has reacted as English law might be expected to react if faced with a similar problem in, say, the Isle of Man, and at least one of these divorces has been held invalid by a Roman court. It is a problem that the United States has not effectively solved either in relation to Reno or Las Vegas, where the largest scale divorce mills have been turning for so long. Now, it seems, St. Thomas in the Virgin Islands, purchased from Denmark in 1917, is finding the industry a short cut from penury to prosperity. Six weeks' qualifying residence and eight grounds for divorce liberally provided by the local legislature brought a harvest of 350 divorces in 1952, with every prospect of an increase. "It is the place," said one satisfied client, "where really nice people go for a divorce. Cases are heard privately in chambers and the coloured judge is so very dignified." Before the industry was founded towards the end of the war there was not a night club on the island. Now, they say, there are nearly thirty. At the moment, however, the island has its heart in its mouth, for the validity of the legislation is likely soon to be challenged in the Supreme Court at Washington.

RICHARD ROE.

NEW YEAR LEGAL HONOURS

BARONS

The Rt. Hon. LESLIE HORE-BELISHA. Called by the Inner Temple, 1923.

The Rt. Hon. HENRY CHARLES PONSONBY, EARL OF DROGHEDA, K.C.M.G. Called by the Inner Temple, 1925.

PRIVY COUNCILLORS

JOHN ARCHIBALD BOYD-CARPENTER, Esq., M.P. Called by the Middle Temple, 1934.

Sir LIONEL FREDERICK HEALD, Q.C., M.P., Attorney-General. Called by the Middle Temple, 1923, and took silk 1937.

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Captain MALCOLM BULLOCK, M.P. Called by the Inner Temple, 1918.

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ALFRED VICTOR CRANE, Esq., Colonial Legal Service, Chief Justice, British Honduras. Called by the Inner Temple, 1935.

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Brigadier ARTHUR MAXWELL RAMSDEN, C.B., O.B.E., T.D., D.L. Admitted 1921.

ORDER OF THE BATH

K.C.B.

HAROLD SIMCOX KENT, Esq., C.B., H.M. Procurator-General and Treasury Solicitor. Called by the Inner Temple, 1928.

ORDER OF ST. MICHAEL AND ST. GEORGE

K.C.M.G.

The Hon. HAROLD ERIC BARROWCLOUGH, C.B., D.S.O., M.C., E.D., Chief Justice of New Zealand.

GERALD GRAY FITZMAURICE, Esq., C.M.G., Legal Adviser to the Foreign Office. Called by Gray's Inn, 1925.

C.M.G.

KENNETH VINCENT-BROWN, Esq., lately Puisne Judge, Trinidad. Called by Gray's Inn, 1915.

ROYAL VICTORIAN ORDER

K.C.V.O.

IRVING BLANCHARD GANE, Esq. Admitted 1914.

ORDER OF THE BRITISH EMPIRE

K.B.E.

Colonel DOUGLAS STEPHENSON BRANSON, C.B., D.S.O., M.C., T.D., D.L. Admitted 1920.

C.B.E.

OLIVER CHARLES BARNETT, Esq., O.B.E., Assistant Judge Advocate-General. Called by the Middle Temple, 1928.

CHARLES PHIPPS BRUTTON, Esq., O.B.E., Clerk of the Peace for Dorsetshire and Clerk of the County Council. Admitted 1926.

PHILIP BURRINGTON DINGLE, Esq., Town Clerk of Manchester. Admitted 1928.

CHARLES STUART HALLINAN, Esq. Admitted 1919.

HERBERT EDGAR JAMES, Esq., Assistant Solicitor, Ministry of Agriculture and Fisheries. Called by Gray's Inn, 1921.

CLEMENT FREDERICK PENRUDDOCK, Esq., Secretary to the Chequers Trust. Admitted 1931.

O.B.E.

JOHN HERBERT WARREN, Esq., General Secretary, N.A.L.G.O. Admitted 1933.

M.B.E.

WILLIAM THOMAS CUTHBERT, Esq., Legal Assistant, Registry of Friendly Societies. Called by the Middle Temple, 1919.

FREDERICK RICHARD HALLETT, Esq., Clerk to the Master of the Rolls.

Major NOEL OUGHTRED TILL. Admitted 1932.

LESLIE WILLIAM STOKES UPTON, Esq., Second Clerk, Judicial Committee, Privy Council Office.

EDMUND ALLISTON WINGROVE, Esq., lately managing clerk, Messrs. Baily Gibson & Co., of Beaconsfield.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Incorporated Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

PROCEDURE: INDEBITATUS COUNT: PLEA OF "NEVER INDEBTED": EFFECT

Bank of New South Wales *v.* Laing

Lord Porter, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen. 7th December, 1953

Appeal from the Supreme Court of New South Wales.

From January, 1947, to February, 1951, the plaintiff, W. R. J. Laing, had a current account with the defendant, the Bank of New South Wales, into which he from time to time had paid sums amounting in the aggregate to over £100,000, and he had also at intervals drawn on the account. He suspected that eight cheques, totalling £19,412 10s. 9d. and debited to his account, had been forged. When so debited those cheques reduced his credit balance to about £18. He thereupon, on 8th February, 1951, presented to the defendant bank eight other cheques for amounts exactly corresponding to those of the cheques which he alleged had been forged, and, the bank having refused to meet his cheques, he claimed the £19,412 10s. 9d. from it by specially indorsed writ. New South Wales has retained the system of pleading which existed in England under the Common Law Procedure Act, 1852—the provisions of which and the rules made thereunder are in substance reproduced in the Common Law Procedure Act, 1899, of New South Wales and the rules made under that Act—and in pursuance of that procedure the plaintiff filed a declaration based on the old "*indebitatus assumpsit*" count in the following terms: "For money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff and for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant," and he claimed the £19,412 10s. 9d. To that declaration the bank filed a plea of "never indebted." At the trial neither party gave or called oral evidence. The plaintiff put in evidence, *inter alia*, a copy of his current account, a letter from the defendant bank to the Bank of Australasia (through which he had presented the eight cheques) returning the cheques and stating, "*bona fide* dispute state of account arising alleged forged cheques," and also the eight cheques as evidence of his demand. The plaintiff relied on those documents cumulatively as admissions by the bank sufficient to entitle him to succeed. The case turned not on the merits—the genuineness or not of the alleged forged cheques—but on a point of pleading, namely, the effect of the plea of "never indebted" in the circumstances of this case. The trial judge found a verdict and entered judgment for the plaintiff for £19,412 10s. 9d., and his judgment was affirmed on appeal to the Full Court of the Supreme Court of New South Wales. The defendant bank appealed.

LORD ASQUITH OF BISHOPSTONE, giving the judgment of the Board, said that the English authorities *Hudson* v. *Bilton* (1856), 6 E. & B. 565, and *Broomfield* v. *Smith* (1836), 1 M. & W. 542, and the wording of r. 65 of the rules made under the Common Law Procedure Act (N.S.W.)—which provided that a "plea of 'never indebted' will operate as a denial of those matters of fact from which the liability of the defendant arises"—showed that on an issue of "never indebted" the onus of proving the fulfilment of conditions precedent to the present payability of the debt was on the plaintiff. *Indebitatus* counts were directed to a debt *solvendum in praesenti*—a debt presently payable—and it was such a debt which the plea "never indebted," filed in answer to an *indebitatus* count, denied and put in issue. The plea put in issue the promise implied by law to pay presently, which only arose if and when the conditions precedent had been performed, and consequently put in issue the performance of those conditions, and put the proof of them on the plaintiff. In a customer and banker case one such condition precedent was the existence in the customer's account of funds sufficient to meet the demand on them. It was for the customer to establish that sufficiency as subsisting at the time of demand. Whether or not an *indebitatus* count was used to recover money lent, where the creditor was a customer and the debtor a bank, on current account the "peculiar incidents" of that relationship governed the legal position and required that, to succeed, the plaintiff must prove a "demand," and also that the "balance" standing to his credit at the time of demand sufficed to pay his demand. If the balance fell short of doing so, even by one penny, he failed altogether. In the present case the plaintiff did not discharge the onus which was on him. He gave no oral evidence, and his only evidence consisted of the current account and the defendant bank's letter to the Bank of Australasia, and neither of those documents in themselves, nor the two in combination, amounted to an admission by the bank that at the date of demand the plaintiff's account contained sufficient funds to meet the demand for £19,412 10s. 9d. In those circumstances their Lordships had no choice but humbly to advise Her Majesty that the appeal should be allowed. In so doing, they could not repress a regret that a matter of substance should have been allowed to turn on a question of technical form. The plaintiff-respondent should pay the costs of this appeal and of the proceedings in the Australian courts.

APPEARANCES: *Sir Garfield Barwick*, Q.C. (Australia), and *J. G. Le Quesne* (*Bell, Brodrick & Gray*); *K. A. Ferguson*, Q.C. (Australia), and *C. L. D. Meares* (Australia) (*Blyth, Dutton, Wright & Bennett*).

[Reported by CHARLES CLAYTON, Esq., Barrister-at-Law] **[2 W.L.R. 25**

COURT OF APPEAL

PROFITS TAX: PREFERENCE SHARES REDEEMED AT PREMIUM: SUM APPLIED IN REDUCTION OF CAPITAL

Inland Revenue Commissioners *v.* Universal Grinding Wheel Co., Ltd.

Singleton, Birkett and Hodson, L.JJ. 27th November, 1953

Appeal from Upjohn, J. ([1953] 3 W.L.R. 29; 97 SOL. J. 404).

The Crown appealed from the decision of Upjohn, J., dismissing an appeal to him by case stated by the Commissioners for the Special Purposes of the Income Tax Acts, who had discharged an assessment to profits tax on the respondent company in respect of 7s. premium paid on each £1 preferred share redeemed by the company. By the articles of association of the company, provision was made in accordance with powers given by s. 46 of the Companies Act, 1929, for the redemption of the £1 preference shares at the price of the nominal amount of the share plus a premium of 7s. a share. In 1947 the company redeemed the preference shares, the redemption being carried out in part by an issue of new capital and in part out of profits available for dividend. In particular, the premium of 7s. was paid out of such profits, as required by s. 46 of the Companies Act, 1929, and by the company's articles of association. Section 36 (1) of the Finance Act, 1947, defines the meaning of a "distribution" for the purpose of profits tax and the proviso to that subsection states: "Provided that no sum applied in . . . reducing the share capital of the person carrying on the trade or business shall be treated as a distribution." The Commissioners had held that the redemption of the preference shares was simply a way of reducing the capital of the company, and that the company had applied 27s. per share in reducing the share capital of the company within the meaning of the proviso to s. 36 (1). Upjohn, J., held that the decision of the Commissioners was right and dismissed the appeal to him. The Crown appealed to the Court of Appeal.

SINGLETON, L.J., said that the appeal depended on the construction of the proviso to s. 36 (1) of the Finance Act, 1947. The case for the Crown was that the premium of 7s. paid on each £1 share was a "distribution" under s. 36 (1) (*a*) or (*b*) and that it was a matter for assessment of profits tax under the Act. The company said that the proviso to s. 36 (1) clearly took the payment out of that category, in other words that it was a sum applied in reducing the share capital of the company. That was the sole point in the case. The redemption of preference capital was equivalent to a reduction of capital (*In re Serpell and Company* [1944] Ch. 233). It was agreed that the question for decision was what amount did the company "apply to reduce its capital." In his view, the word "applied" in the proviso to s. 36 (1) had the same meaning as "paid." The company could not redeem the preference shares unless they paid 27s. a share to the holders of those shares. In paying that amount they were "applying" it to redeem the preference shares and so to reduce the share capital of the company. Thus the sum that they paid was applied in reducing the capital of

the company and did not fall to be treated as a distribution. He agreed with the judgment of Upjohn, J., and was in favour of dismissing the appeal.

BIRKETT, L.J., delivered judgment to the same effect.

HODSON, L.J., dissenting, said that in his opinion no sum paid in excess of £1, the full nominal value of the shares to be redeemed, could accurately be described as having been applied in reducing the capital. The amount of the reduction of the capital was limited by the amount of the capital itself, and any sum in excess of £1 applied was applied, not in reduction of the capital, but as the price of redemption. In his opinion the appeal should be allowed. Appeal dismissed. Leave to appeal.

APPEARANCES: *Montgomery White*, Q.C., *J. H. Stamp* and *Sir Reginald Hills* (*Solicitor of Inland Revenue*); *Roy Borneman*, Q.C., and *Gordon Richardson* (*Linklaters & Paines*).

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law] **[2 W.L.R. 37**

INTERNATIONAL LAW: INTESTACY: ESTATE IN ENGLAND: DECEASED OF SPANISH DOMICILE: RECOGNITION OF FOREIGN STATE AS "SUCCESSOR"

In the Estate of Maldonado, deceased; State of Spain *v.* Treasury Solicitor

Evershed, M.R., Jenkins and Morris, L.JJ.
30th November, 1953

Appeal from Barnard, J. ([1953] 3 W.L.R. 204; 97 SOL. J. 457).

The deceased, a Spanish subject domiciled and resident in Spain, died intestate, leaving no next of kin. The State of Spain claimed a grant of administration to the personal estate of the deceased in England as sole and universal heir to her estate by Spanish law; the Treasury Solicitor claimed that the personal estate in England belonged to the Crown as *bona vacantia*. Barnard, J., held that the Spanish State was a true heir according to Spanish law and, recognising that right, he ordered that letters of administration of the English estate should be granted to the duly constituted attorney of the Spanish State. The Crown appealed against the decision that the court should recognise the State of Spain as a true successor to the deceased for the purposes of the administration of the English estate but did not challenge the finding as to Spanish law.

EVERSHED, M.R., referred to *In re Barnett's Trusts* [1902] 1 Ch. 847; 18 T.L.R. 454; and *In the Estate of Musurus, deceased* [1936] 2 All E.R. 1666, and said that there was a recognisable distinction drawn in the cases and text-books between a State taking by virtue of a *jus regale* as paramount authority and taking as heir or successor. Barnard, J., had decided that the Spanish State took according to Spanish law as a true successor and that defeated the claim of the English Crown to the estate as *bona vacantia*, for where a person died domiciled abroad leaving personal estate in England the law of the domicile governed the distribution of that estate. The property only came to the Crown as *bona vacantia* if the deceased died leaving no successors according to the law of that domicile, or if the State of the domicile sought to assert a right to the property, not as successor to the deceased, but by a *jus regale* which the English courts would not recognise as having extra-territorial validity, and Barnard, J., had found that that was not so here. "Succession" doubtless imputed some notion of continuity, but his lordship saw no reason why that conception should be inapplicable to a State which was constituted successor by its own laws.

JENKINS, L.J., agreed. In applying the maxim *mobilia sequuntur personam* there was no valid ground for differentiating between successors who were personally connected with the deceased and other persons or bodies, including the State, which were by the law of the deceased's domicile constituted successors. The claim of the State of Spain was not the assertion by a foreign State of a prerogative right which had no extra-territorial validity and which would yield to the corresponding prerogative right of the Crown, for, as Barnard, J., had found, the State of Spain had constituted itself a true successor of the deceased. The English courts must recognise the capacity in which the Spanish State claimed and, consequently, the deceased had left a "successor" so that the right of the British Crown to take the estate in England as *bona vacantia* did not arise.

MORRIS, L.J., agreed. Appeal dismissed. Leave to appeal.

APPEARANCES: *Sir Lynn Ungoed-Thomas*, Q.C., and *Victor Russell* (*Treasury Solicitor*); *Charles Russell*, Q.C., and *I. J. Lindner*, Q.C. (*Vernor Miles & Clark*).

[Reported by Miss E. DANGERFIELD, Barrister-at-Law] **[2 W.L.R. 64**

COMPANY: REDUCTION OF CAPITAL PREJUDICIAL TO PREFERENCE SHAREHOLDERS' RIGHTS: NOT JUST AND EQUITABLE

***In re* Old Silkstone Collieries, Ltd.**

Evershed, M.R., Jenkins and Morris, L.JJ. 2nd December, 1953

Appeal from Vaisey, J.

Under the provisions of the Coal Industry Nationalisation Act, 1946, the business of Old Silkstone Collieries, Ltd., vested in the National Coal Board and thereafter the company only continued in order to collect the compensation to which it had become entitled under that Act with a view to ultimate liquidation. The paid up capital of the company consisted of first preference stock, second preference stock and ordinary stock. The first preference stockholders were entitled to a fixed cumulative preferential dividend of 6 per cent. and, on a winding up, to repayment of their capital in priority to the other stockholders. The second preference stockholders were entitled to 5 per cent. non-cumulative preference dividend ranking after the first preference dividend, and had a further right to participate in the profits of the company, and were entitled to repayment of capital in priority to the ordinary stockholders. Under art. 6 of the articles the special rights attached to any class of stock might, with the sanction of an extraordinary resolution passed at a separate general meeting of such holders, but not otherwise, be abrogated or modified. Article 65 provided that the first preference stock should not entitle the holders to attend and vote at any general meeting unless, *inter alia*, the business of the meeting included a resolution directly and prejudicially affecting the special rights attached to the preference stock. By a circular letter dated July, 1950, the board recommended repayment of 10s. to the first and second preference stockholders for every £1 of stock held by them, and it was stated in that circular that it was the board's intention that any rights preference stockholders might have under s. 25 of the Coal Industry Nationalisation Act, 1946, should be retained until the amount of the compensation payable to the company had been determined. By a special resolution of August, 1950, passed at an extraordinary general meeting of the company at which all the stockholders, preference and ordinary, were treated as entitled to vote, the capital was reduced accordingly. That resolution provided that notwithstanding the reduction the holders of the two classes of preference stock "shall remain entitled to claim the same adjustment of their interests as could have been claimed under s. 25 [of the Act of 1946] as if the said reduction of capital had not taken effect." By similar procedure and with similar safeguards, a repayment of 5s. on the preference stocks was effected in 1951. Both those reductions of capital were duly confirmed by the court. In April, 1953, the directors issued a third circular to the stockholders in which they stated that they had given consideration to the terms of repayment of the preference stocks and that they were of opinion that the rights of such stockholders under s. 25 of the Act of 1946 had no monetary value, and they proposed repayment at par. The circular then continued: "These proposals have been submitted to and discussed with the Association of Investment Trusts and the British Insurance Association Investment Protection Committee who are recommending their interested members to vote in favour of the resolutions to be proposed at the extraordinary general meeting and to take no part in promoting or supporting any proposal for an adjustment scheme." No special meetings were called of the first and second preference stockholders, but by a special resolution of the company passed at an extraordinary meeting of the company held in May, 1953, at which the second, but not the first, preference stockholders were present, it was resolved that the capital of the company be reduced by repaying to each holder of first and second preference stock the whole paid up capital of the holding of such stockholder. By the petition the company asked the court to approve such reduction. Vaisey, J., made an order confirming the reduction subject to the provision that the rights which the preference stockholders would have had but for the reduction should not be affected. Certain preference stockholders appealed.

EVERSHED, M.R., said that it was common ground that the protective proviso made by Vaisey, J., was ineffective, as after the extinction of their stockholdings the preference shareholders would have no *locus standi* to make claims. Two points had been raised; first, that as a result of the previous reductions the preference shareholders had acquired a special right within the meaning of the articles so that it was incompetent for the company to proceed with the final reduction without the assent of separate

meetings of the preference shareholders. Secondly, even if no such special right had been created, the court ought to refuse to sanction the proposal on the ground that it was not fair and equitable in the circumstances. The first contention prevailed. It was true that in the *Wilsons & Clyde Coal* ([1949] A.C. 462) and *Chatterley-Winfield* ([1949] A.C. 512) cases, the House of Lords had made observations indicating that not much fruit was likely to be gathered by preference shareholders from s. 25, but it would be going too far to read those observations as indicating that, in such a case as the present, preference shareholders could have no valid expectation of compensation or adjustment; all that could be said was that such expectations were doubtful or speculative. The resolutions of 1950 and 1951 did create special rights, and that being so, the petition must be dismissed. On the second point, it had always previously been made clear that it was proposed to postpone consideration of the adjustment scheme until the amount of compensation payable had been determined, and the previous resolution had been passed with that in mind. That being so, though there was no imputation on the good faith of the directors, it was not fair and equitable for them now to change their minds, a view supported by the language of Bowen, L.J., in the *Birmingham and District Land Co.* case (1888), 40 Ch. D., at p. 286. Finally, the statement as to the views of the Insurance and Investment Trust Associations, which did not disclose the very small and conflicting interests of the members concerned, might have had so important an effect as to be undesirable.

JENKINS and MORRIS, L.JJ., agreed. Appeal allowed.

APPEARANCES: *J. G. Strangman*, Q.C., and *P. R. Oliver* (*Hardman, Phillips & Mann*); *Sir Andrew Clark*, Q.C., and *P. J. Sykes* (*Clifford-Turner & Co.*, for *Hepworth & Chadwick*, Leeds).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [2 W.L.R. 77

LANDLORD AND TENANT: RE-GRANT OF SPORTING RIGHTS BY FARMER TO LANDLORDS: DESTRUCTION OF RABBITS BY AGRICULTURAL EXECUTIVE COMMITTEE

Mason and Another *v.* Clarke

Somervell, Denning and Romer, L.JJ.

8th December, 1953

Appeal from Croom-Johnson, J.

By an agreement under which the second plaintiff, a company, let certain farm land to the defendant, a farmer, the company reserved to itself "(subject to the provisions of the Ground Game Act, 1880) all the game, rabbits, wildfowl and fish with liberty for itself and all other persons authorised by it, to preserve, hunt, course, kill and carry away the same," and the defendant agreed "(subject to the Ground Game Act) not to shoot or otherwise sport on the land." The company orally leased the rabbiting rights over the land to the first plaintiff, who laid snares on land where the defendant's sheep grazed. The defendant entered into an agreement with the Agricultural Executive Committee for the latter to gas rabbits in the defendant's hedgerows in order to keep them down, and the committee did so. The plaintiffs claimed that that and certain other acts of alleged interference by the defendant were a breach of his covenant and constituted a trespass against their enjoyment of the *profit à prendre*. The parol agreement between the two plaintiffs for the lease of the rabbiting rights was evidenced by a receipt which stated that the consideration paid by the first to the second plaintiff was a "contribution towards bailiff's wages." The defendant alleged that that receipt was issued in furtherance of an illegal purpose, to defraud, it was suggested, the Inland Revenue, and that as such it could not be relied upon to support the plaintiffs' claims. Croom-Johnson, J., gave judgment for the plaintiffs. The defendant appealed.

DENNING, L.J., said that the so-called "reservation" as to game was properly a re-grant by the defendant, as a *profit à prendre* took effect only by grant. The obligations of the defendant were two only; "not to shoot or otherwise sport on the land" except in accordance with the Ground Game Act, 1880; and not to derogate from his grant, which meant, not to destroy wilfully game or rabbits except in the proper exercise of rights of cultivation and good husbandry (*Peech* v. *Best* [1931] 1 K.B. 1). No complaint could be made of the gassing of the hedgerows, as the rabbits had become a pest, and the gassing was a necessary agricultural operation. Further, the operation appeared to be justified by s. 1 (1) (*b*) of the Act of 1880. The first plaintiff further complained that his snares had been kicked over. But he had no right in law to a *profit à prendre*, which could only be granted by deed; he had also no right in equity, as the receipt on which he relied was plainly false and could only have been made with some dishonest motive; no court would grant him specific performance. He had no right to be on the land, and it was unreasonable to set snares on land where sheep were grazing, in view of the possible danger. Accordingly, neither plaintiff could complain of the defendant's acts, and the appeal should be allowed.

SOMERVELL and ROMER, L.JJ., agreed. Appeal allowed.

APPEARANCES: *J. Hobson* (*James & Charles Dodd*, for *Josiah Hincks & Son*, Leicester); *J. Perrett* (*Wigan & Co.*, for *Phipps and Troup*, Northampton).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [2 W.L.R. 48

REVENUE: INCOME TAX: "PERSON" SUCCEEDS TO ANY TRADE: "PERSON" INCLUDES THE CROWN

Boarland (Inspector of Taxes) *v.* Madras Electric Supply Corporation (in Liquidation)

Singleton, Birkett and Hodson, L.JJ. 9th December, 1953

Appeal from Upjohn, J. ([1953] Ch. 499; 97 SOL. J. 489), reversing a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The undertaking of an electricity supply company in India was purchased by the Madras government, acting as a branch of the Crown, on 29th August, 1947. The company received an assessment to income tax for the year 1947/48, under case I of Sched. D, which included an estimated balancing charge of £850,000. The Commissioners found as a fact that the undertaking in Madras was not discontinued on 29th August, 1947, but continued to be carried on without interruption under a department of the Madras Government. They held, however, that the word "person" in r. 11 (2) of the rules applicable in cases I and II of Sched. D of the Income Tax Act, 1918 (which is concerned with a "person" succeeding to any trade), did not apply to the Crown and they accordingly discharged the assessment on the company. On an appeal by the Crown by case stated, Upjohn, J., reversed the decision of the Commissioners.

SINGLETON, L.J., said that the contention for the company was that the Queen was the Monarch legislating with the other estates; that the Finance Acts were all addressed to subjects; that charging orders could not include the Crown itself, and that therefore the word "person" in a charging order or section would not include the Crown, since the Crown did not impose a tax upon itself. It had not been disputed that the Monarch was a person, but it was said that he (or she) was not a "person" within the meaning of that word in the Income Tax Act, 1918, or, at least, for the purposes of Sched. D. He could see no reason why the ordinary meaning should not be given to the word "person" when considering r. 11 (2). Of course, the Crown was not chargeable under Sched. D; that followed from the exemption arising from the prerogative. It was submitted for the Crown that the word "person" must be given its ordinary meaning apart from some compelling reason to the contrary, and that "person" included the Crown and servants of the Crown. It appeared to him (Singleton, L.J.) that the contention put forward by the company failed since he could find nothing to justify giving a limited meaning to the word "person" in r. 11 (2), which must be read in the ordinary way. He agreed with the conclusion of Upjohn, J., and would dismiss the appeal of the company.

BIRKETT, L.J., concurred, and HODSON, L.J., delivered an assenting judgment. Appeal dismissed. Leave to appeal.

APPEARANCES: *J. Millard Tucker*, Q.C., and *John Clements* (*Sanderson, Lee & Co.*); *Sir Lionel Heald*, Q.C., A.-G., *J. H. Stamp* and *Sir Reginald Hills* (*Solicitor of Inland Revenue*).

[Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law] [1 W.L.R. 87

CHANCERY DIVISION

WILL: PROTECTIVE TRUSTS: ADVANCEMENT: FORFEITURE

***In re* Rees, deceased; Lloyds Bank, Ltd. *v.* Rees and Others**

Upjohn, J. 4th December, 1953

Adjourned summons.

A testator by his will made in 1935 gave his residue on trust for sale, and in trust to divide the income between his three

grandchildren during their lives and thereafter to divide the estate equally *per stirpes* between their surviving children. The grandchildren's life interests were subject to protective trusts which did not incorporate the words of s. 33 of the Trustee Act, 1925, but were to come into effect if a beneficiary were to "do or suffer anything whereby the life interest or any part thereof would become payable to or vested in any other person," whereupon the trustees were authorised to pay a discretionary annuity. The trustees took out a summons to ascertain (1) whether, by virtue of s. 32 of the Trustee Act, 1925, they might, subject to the necessary consents, make an advancement in favour of a great-grandchild; (2) whether the giving of such a consent by a grandchild would operate as a forfeiture.

UPJOHN, J., said that the terms of s. 32, incorporating a power of advancement, were satisfied, so that it applied unless a contrary intention appeared in the will in accordance with s. 69 (2). It had been argued that the discretionary annuities after forfeiture provided by the protective trusts indicated a contrary intention; but the proper view was that, as the will was silent as to powers of advancement, the draftsman must be assumed to have had s. 32 in mind; and to exclude the very beneficial power of advancement conferred thereby there must be expressed a clear contrary intention, and no such intention appeared in the will. Accordingly, s. 32 must be read into the will (*In re Garrett* [1934] Ch. 477). As to whether a forfeiture would be incurred by a life-tenant giving a consent under s. 32, on the literal words of the will, such a consent would bring into operation the protective trust; but in *In re Hodgson* [1913] 1 Ch. 34 Neville, J., held that a forfeiture clause was not to affect any steps taken to enable an express power of advancement to be exercised. That case had been followed by Harman, J., in *In re Shaw's Settlement* [1951] Ch. 833 in preference to a contrary decision in *In re Stimpson's Trusts* [1931] 2 Ch. 77, which he characterised as unsatisfactory. In both the *Hodgson* and *Shaw* cases there was an express power of advancement; but since, as had been already held, s. 32 was to be read into the will, they were applicable; so that consent to an advancement by a life-tenant did not operate to forfeit the life interest. Declarations accordingly.

APPEARANCES: *J. A. Armstrong; John Wood; R. Gwyn Rees* (*Church, Adams, Tatham & Co.*, for *Rees & Wood*, Cardiff.)

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [2 W.L.R. 59

NATIONAL HEALTH SERVICE: HOME FOR INCURABLES: WHETHER A "HOSPITAL" VESTING IN THE MINISTER

Minister of Health *v.* General Committee of the Royal Midland Counties Home for Incurables at Leamington Spa

Vaisey, J. 9th December, 1953

Special case stated by an arbitrator.

A dispute having arisen between the general committee of a home for incurables and the Minister of Health as to whether the home vested in the Minister on 5th July, 1948, under the provisions of the National Health Service Act, 1946, the question was referred to arbitration. The arbitrator found that the primary purpose of the home was "to provide the patients with the care and attention they required in pleasant surroundings with the necessary nursing under adequate medical supervision"; that curative treatment was not provided, and that the palliative medical treatment provided was subsidiary to the main purpose of the home. He accordingly held that the home was not a "hospital" within s. 79 of the Act, and did not vest in the Minister under s. 6 (1). He stated a case for the opinion of the court.

VAISEY, J., said that the patients were admitted on the footing that, while they would get the necessary care and nursing, they would not get any specific treatment, as their complaints had to be regarded as incapable of cure. The arbitrator had been right in his view as to the primary and subsidiary purposes of the home. The question was whether the institution was in truth a home and not a hospital. There were various differing statutory definitions of "hospital"; but that in s. 79 (1) of the Act was "'Hospital' means any institution for the reception and treatment of persons suffering from illness . . ." and "'Illness' includes . . . any injury requiring medical or dental treatment or nursing." The case was on the borderline; but, as the Act was confiscatory, it would not be right to dispossess the general committee unless the home plainly came within the definition. "Treatment" was probably the key word; that suggested something more than mere palliation, and implied a process directed towards a cure. The unreported Scottish case of *Royal Victoria Hospital* v. *Wheatley*, in which the decision was in favour of the Minister, was distinguishable in that the Dundee hospital dealt with cases where death was imminent, whereas the Leamington home dealt with cases where there was a comparatively long expectation of life. The arbitrator's decision was right, and there would be a declaration that the home had not vested in the Minister. Declaration accordingly.

APPEARANCES: *G. Cross*, Q.C., and *Denys Buckley* (*Solicitor, Ministry of Health*); *Charles Russell*, Q.C., and *H. E. Francis* (*Farrer & Co.*, for *Field & Sons*, Leamington Spa).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 79

ENTERTAINMENTS DUTY: VARIETY ENTERTAINMENT

Eastbourne Corporation *v.* Commissioners of Customs and Excise

Danckwerts, J. 11th December, 1953

Action.

A corporation, acting under its statutory powers, produced five performances. The first three comprised a number of musical solos and items, together with comic songs, dialogues and monologues by the well-known comedians Richard Murdoch, Kenneth Horne, Tommy Fields and Robb Wilton. The fourth performance comprised only musical songs and solos. The fifth performance was one of a series billed as "Gracie Fields' Concert Tour," and included, in addition to a number of light musical items, a large number of songs by Gracie Fields herself. The corporation claimed that these performances were exempt from entertainments duty. By s. 8 (1) of the Finance Act, 1946, there are exempted from duty " . . . (*c*) a performance of music (whether vocal or instrumental) . . . (*f*) a recitation . . . where the commissioners are satisfied that the entertainment is provided by a society . . . which is not conducted or established for profit and that the aims . . . of the society are partly educational." By s. 3 (1) of the Finance Act, 1952: "An entertainment consisting of one or more of the items specified in s. 8 (1) of the Finance Act, 1946 . . . shall be treated as not falling within the said subs. (1) if it is a music hall or other variety entertainment."

DANCKWERTS, J., said that only (*c*) and (*f*) in s. 8 (1) could possibly apply to the performances in question. It was not open in the present action to consider whether the plaintiffs were a society of the kind necessary to qualify for exemption from duty. That was a matter for the commissioners, though the question might be brought before the court in other proceedings. The first three concerts were similar, consisting of musical items and turns by well-known comedians. It was suggested that these turns were "recitations," which, according to the dictionary, meant repeating something learned by heart. But dictionary definitions did not always present a living picture, and common sense must be applied, and when so applied, it did not appear that the word in the context of the Acts had reference to the diverting entertainments of the performers in question, so that those three performances failed to qualify for exemption. The fourth performance contained no variety turn, and qualified for exemption. The fifth performance was the most difficult to classify, but, on the evidence, the best view seemed to be that a performance was a "variety entertainment" if it was dominated by a well-known variety performer doing his or her usual act as performed in a variety house; by that standard, the fifth performance was not entitled to exemption. Declarations accordingly.

APPEARANCES: *J. Millard Tucker*, Q.C., and *J. Clements* (*Sharpe, Pritchard & Co.*, for *F. H. Busby*, Town Clerk, Eastbourne); *Sir R. Manningham-Buller*, Q.C., S.-G., *Viscount Hailsham*, Q.C., and *J. P. Ashworth* (*Solicitor of Customs and Excise*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 109

TRADE MARK: RECTIFICATION: ROSES: TRADE MARKS THE "VARIETY" NAMES

In re Wheatcroft Bros. Ltd.'s Trade Marks

Lloyd-Jacob, J. 16th December, 1953

Motion.

Wheatcroft Bros., Ltd., a firm of rose growers, were the registered proprietors of eleven trade marks registered in respect of roses; the marks being "Coppelia," "Cocorico," "Pigalle," "Confidence," "Mahina," "Mascotte," "Moulin Rouge," "Tzigane," "Festival" and "Magali." They failed to disclose in the application for registration that these names were also the variety names. Application was made by the Wisbech Plant

Co., Ltd., another firm of rose growers, under s. 32 of the Trade Marks Act, 1938, for the rectification of the Register of Trade Marks by removal of the marks, on the grounds: (1) that the variety names could not be distinctive within the meaning of s. 9 and were therefore wrongly registered; (2) that their continuance on the register would cause confusion and was contrary to s. 11. The evidence was that variety names were registered with the National Rose Society, and were alone used by the trade and public as the designations of particular roses. The respondents contended, *inter alia*, that the objection that a trade mark was invalid because it was the descriptive name of an article should be determined by s. 15, and not by ss. 9 and 11.

LLOYD-JACOB, J., said that the respondents had acknowledged in evidence that it would be wholly impracticable to designate a rose in the course of trade by a name other than that under which the variety was registered with the National Rose Society, and they further acknowledged that should this be attempted, chaotic conditions would result. It was clear that at the respective dates of application for each of these marks, the respondents intended only to use each mark in relation to one variety of rose, which variety they intended either was or would be characterized by the same name recorded in the register of the society. Had the application form accurately reflected these intentions the registrar could not have regarded the mark proposed as inferentially distinctive. The registrations examined in the light of the evidence adduced did not comply with the requirements of s. 9 (1) (*d*) of the Act, and the marks were therefore registered without sufficient cause. The continuance on the register of these marks would in the circumstances inevitably cause confusion, and constitute an impediment and embarrassment to traders, and they must be expunged from the register. Section 15 of the Act was only concerned with what occurred after registration, and could not restrict investigation into distinctiveness under s. 9, or into the question of confusion under s. 11, so that the contention under that section failed; that section moreover contained a positive direction to deem as wrongly registered any mark which by reason of concurrent user in a descriptive sense would occasion deception or confusion. Application granted.

APPEARANCES: *Basil Drewe*, Q.C., and *T. A. Blanco-White* (*Metcalfe, Copeman & Pettefar*); *Geoffrey Tookey*, Q.C., and *P. Stuart Bevan* (*Smith & Hudson*, for *Day, Johnson & Boot*, Nottingham).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] **[1 W.L.R. 116**

QUEEN'S BENCH DIVISION

NEGLIGENCE: *RES IPSA LOQUITUR*: INJURY BY CONTAMINATED ANAESTHETIC

Roe *v.* Minister of Health and Others. Woolley *v.* Same

McNair, J. 12th November, 1953

Action.

Two patients in hospital were operated on on the same day in 1947. Both operations were of a minor character and in each case a spinal anæsthetic, namely, nupercaine, was injected by means of a lumbar puncture by a specialist anæsthetist assisted by the theatre staff of the hospital. The nupercaine had been contained in sealed glass ampoules which had been stored in a solution of phenol. After the operations both patients developed severe symptoms of spastic paraplegia resulting in permanent paralysis from the waist down. In actions for damages for personal injuries against the Minister of Health as successor in title to the trustees of the hospital, and against the anæsthetist, the plaintiffs relied on the doctrine of *res ipsa loquitur* inasmuch as the injuries which they had sustained did not normally follow on a spinal anæsthetic properly administered. The defendants denied negligence, and contended that the injuries were in fact caused by the nupercaine itself administered without negligence. Accordingly, the manufacturers of the nupercaine were joined as third defendants but were subsequently dismissed from the case.

MCNAIR, J., said that the obligations of the hospital towards patients were as laid down in *Gold* v. *Essex County Council* [1942] 2 K.B. 293 and by the majority of the court in *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343; in the case of a consultant, which the anæsthetist was, no inference could be drawn that the hospital undertook responsibility for his negligent acts. The hospital had provided a competent anæsthetist, but was responsible for any negligent acts of the theatre staff. The maxim *res ipsa loquitur* could not apply where an operation was under the control of two persons not in law responsible for each other, since the *res* did not speak of negligence against either individually. An anæsthetist was responsible for the choice of anæsthetic and for its preparation by the theatre staff, but was not responsible for their casual acts of negligence. Accordingly, the doctrine did not apply, and the plaintiff must prove negligence in the ordinary way. On the evidence, it was established that the injuries were caused by contamination by phenol. It was now known, but only since 1951, that phenol could find its way into an ampoule through cracks not ordinarily perceptible or through molecular flaws in the glass. That risk was not appreciated by competent persons in 1947, so that the anæsthetist, and *a fortiori* the theatre staff, had not been negligent in that regard. There was no evidence that the ampoules in question had visible cracks, which ought to have been detected, and no case of negligence had been made out. Judgment for the defendants.

APPEARANCES: *R. Elwes*, Q.C., *J. Hobson* and *R. F. Hannay* (*Gibson & Weldon*, for *John Whittle, Robinson & Bailey*, Manchester); *M. Berryman*, Q.C., *R. Marven Everett*, Q.C., and *J. S. Macaskie* (*Berrymans*); *H. B. H. Hylton-Foster*, Q.C., and *J. R. Cumming-Bruce* (*Hempsons*); *G. Paull*, Q.C., *N. Faulks* and *P. Syrett* (*Swepstones*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] **[1 W.L.R. 128**

LEEDS ASSIZES

MENTAL DEFICIENCY: PROCURATION OF MENTAL DEFECTIVE GIRL: CARNAL KNOWLEDGE OF GIRL WHO IS UNDER STATUTORY SUPERVISION

R. *v.* Cook

Stable, J. 17th November, 1953

Trial before Stable, J., and a jury.

The defendant was charged with procuration of a mental defective girl contrary to s. 56 (1) (*b*) of the Mental Deficiency Act, 1913, the particulars being that between 12th April and 21st May, 1953, he procured Jean Pearson, a girl aged seventeen years, who was then a defective, to have unlawful carnal connection with himself. The facts proved by witnesses for the prosecution were that the girl Pearson was on 15th January, 1951, certified as, and had ever since that date been, a feeble-minded person under the Mental Deficiency Acts. She had not been placed in any institution or certified house or approved home or placed out on licence therefrom or under guardianship, but had been placed under the supervision of a Miss Appleyard, a mental health social worker, under the Mental Deficiency Acts. In April, 1953, Miss Appleyard boarded Pearson out with Mrs. Cook, the wife of the defendant, at the defendant's house. While Pearson was so boarded at the house the defendant had carnal connection with her.

STABLE, J. Section 56 (1) (*b*) says: "... who procures or attempts to procure any woman or girl who is a defective to have unlawful carnal connection," so that the act of intercourse has to be an unlawful act of intercourse and then you are thrown back on s. 56 (1) (*a*). What is meant by the word "unlawful"? Does it mean outside the bonds of matrimony?

Counsel for the defendant submitted that there was no case to answer.

STABLE, J., addressing the jury, said that s. 56 (1) (*a*) of the Mental Deficiency Act, 1913, provided that it was an offence to have intercourse with a mental defective who was in an institution, or who had been placed out on licence or who had been placed under a guardianship order. It did not say that it was a criminal offence to have sexual intercourse with a girl who was merely under statutory supervision, as that girl in question was. Therefore, the act of intercourse with that girl was not a criminal offence. If she had been under guardianship or if she had been an inmate of one of these homes it would have been, unless the man could have satisfied them that he did not know and had no reasonable grounds to suspect it; but Parliament had definitely refrained from making it a criminal offence to have intercourse with a girl in her situation. To get over that difficulty the defendant was charged under paragraph (*b*) of the same section of the Act which made it an offence to procure a defective girl to have sexual intercourse with a man. It was not easy to define what procuration amounted to but there was not a shred of evidence that the defendant procured anybody. He did not get the girl to come into his house. He did not get her away from her mother. Nobody suggested that Mrs. Cook was a procuress, getting hold of the girl for immoral purposes.

Inasmuch as the Act had most specifically refrained from making the act of intercourse itself a criminal offence, there was no evidence before the members of the jury on which they could convict the defendant of an offence under the Act. Although they might think that there was a defect in the law, they had no alternative but to return a verdict of not guilty against the defendant. Verdict of not guilty.

APPEARANCES: *A. M. Hurwitz* (*R. C. Linney*, County Hall, Wakefield); *Dodson* (*Carter, Bentley & Gundill*, Pontefract).

[Reported by Miss SHEILA COBON, Barrister-at-Law] **[1 W.L.R. 125**

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

British Guiana (Constitution) (Temporary Provisions) Order in Council, 1953. (S.I. 1953 No. 1910.) 11d.

Building Byelaws (Extension of Operation) (No. 3) Order, 1953. (S.I. 1953 No. 1887.) 6d.

Cheese (Amendment No. 3) Order, 1953. (S.I. 1953 No. 1888.)

Coal Industry (Workmen's Compensation Liabilities) (Mutual Indemnity Companies) Order, 1953. (S.I. 1953 No. 1900.) 8d.

Coal Industry Nationalisation (Payment of Costs) Regulations, 1953. (S.I. 1953 No. 1894.) 5d.

Consular Conventions (French Republic) Order, 1953. (S.I. 1953 No. 1455.)

Defence Regulations (No. 16) Order, 1953. (S.I. 1953 No. 1911.)

Diplomatic Immunities (Federation of Rhodesia and Nyasaland) Order, 1953. (S.I. 1953 No. 1903.)

Dressmaking and Women's Light Clothing Wages Council (Scotland) Wages Regulation (Amendment) (No. 2) Order, 1953. (S.I. 1953 No. 1880.) 5d.

Eggs (Minimum Prices 1954–55 and 1955–56) Order, 1953. (S.I. 1953 No. 1854.) 5d.

Fat Cattle and Fat Sheep (Minimum Prices for 1954–55 and 1955–56) Order, 1953. (S.I. 1953 No. 1851.) 5d.

Fat Pigs (Minimum Prices for 1954–55 and 1955–56) Order, 1953. (S.I. 1953 No. 1853.) 6d.

Foreign Compensation (Czechoslovakia) (Amendment) (No. 2) Order, 1953. (S.I. 1953 No. 1902.)

Fur Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1953. (S.I. 1953 No. 1912.) 6d.

Imported Canned Fruit (Amendment) Order, 1953. (S.I. 1953 No. 1917.)

Iron and Steel (Compensation to Officers and Servants) (No. 1) Regulations, 1953. (S.I. 1953 No. 1848.) 8d.

Iron and Steel (Compensation to Officers and Servants) (No. 2) Regulations, 1953. (S.I. 1953 No. 1849.) 8d.

Labelling of Food (Amendment) Order, 1953. (S.I. 1953 No. 1889.)

Lace Furnishings Industry (Export Promotion Levy) (Amendment No. 2) Order, 1953. (S.I. 1953 No. 1913.)

Lace Industry (Scientific Research Levy) (Amendment No. 2) Order, 1953. (S.I. 1953 No. 1914.)

Local Government (Allowances to Members) (Prescribed Bodies) (Scotland) Amendment Regulations, 1953. (S.I. 1953 No. 1878 (S.127).)

London-Norwich Trunk Road (Wymondham By-Pass) Order, 1953. (S.I. 1953 No. 1881.)

London Traffic (Prescribed Routes) (No. 33) Regulations, 1953. (S.I. 1953 No. 1890.)

London Traffic (Prohibition of Waiting) (Dartford) Regulations, 1953. (S.I. 1953 No. 1896.)

Merchant Shipping (Foreign Deserters) (Morocco and Fez) (Revocation) Order, 1953. (S.I. 1953 No. 1904.)

Merchant Shipping (Foreign Deserters) (Republic of France) (Revocation) Order, 1953. (S.I. 1953 No. 1905.)

Mid Kent Water (No. 3) Order, 1953. (S.I. 1953 No. 1915.) 11d.

Milk (Minimum Prices for 1954–55 and 1955–56) Order, 1953. (S.I. 1953 No. 1855.) 5d.

Motor Vehicles (International Circulation) (Amendment) Regulations, 1953. (S.I. 1953 No. 1895.)

Northern Rhodesia (Legislative Council) (Amendment) Order in Council, 1953. (S.I. 1953 No. 1907.) 5d.

Pacific (Amendment) Order in Council, 1953. (S.I. 1953 No. 1909.)

Patents, etc. (Greece) (Convention) Order, 1953. (S.I. 1953 No. 1899.)

Public Trustee (Fees) Order, 1953. (S.I. 1953 No. 1875.)

Retention of Cables, Mains and Pipes over and under Highways (Devon) (No. 2) Order, 1953. (S.I. 1953 No. 1883.) 5d.

River Inspectors (Qualifications) (Scotland) Order, 1953. (S.I. 1953 No. 1877 (S.126).)

Scottish Hospital Endowments Research Trust Regulations, 1953. (S.I. 1953 No. 1918 (S.128).) 5d.

Ships' Stores Order, 1953. (S.I. 1953 No. 1897.) 6d.

Stopping up of Highways (County Borough of Southampton) (No. 1) Order, 1953. (S.I. 1953 No. 1885.)

Stopping up of Highways (East Sussex) (No. 1) Order, 1953. (S.I. 1953 No. 1884.)

Stopping up of Highways (London) (No. 24) Order, 1953. (S.I. 1953 No. 1893.)

Stopping up of Highways (Portsmouth) (No. 1) Order, 1953. (S.I. 1953 No. 1892.)

Stopping up of Highways (Staffordshire) (No. 7) Order, 1953. (S.I. 1953 No. 1891.)

Stopping up of Highways (Wiltshire) (No. 4) Order, 1953. (S.I. 1953 No. 1882.)

Uganda (Amendment) Order in Council, 1953. (S.I. 1953 No. 1908.) 5d.

University of St. Andrews Act, 1953 (Commencement) (No. 2) Order, 1953. (S.I. 1953 No. 1898 (C.7).)

Vestry of St. Giles without Cripplegate (Resumption of Elections) Order, 1953. (S.I. 1953 No. 1901.) 5d.

Wool (Guaranteed Average Price) Order, 1953. (S.I. 1953 No. 1852.)

Wool (Minimum Prices for 1954–55 and 1955–56) Order, 1953. (S.I. 1953 No. 1856.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

NOTES AND NEWS

Honours and Appointments

The Queen has been pleased to approve the appointment of Sir GEORGE DOUGLAS MCNAIR, M.B.E., to be Deputy Chairman of the Court of Quarter Sessions for the County of Devon as from 1st January, 1954.

Mr. LYON CLARK, solicitor, of West Bromwich, has been reappointed chairman of the local employment committee for the next three years by the Minister of Labour. He has been a member of the committee for twenty-seven years.

The Lord Chancellor has appointed Mr. FRANCIS FREDERICK HALES to be the Registrar of Ilford, Brentwood, Grays, Thurrock and Southend County Courts, as from 1st January, 1954, in succession to Mr. E. A. Everett.

Mr. ROBERT BERNARD STRANGEWAYS, solicitor, of Faringdon, Berks, has been appointed clerk to the Faringdon magistrates.

Personal Notes

Mr. Abraham Nathan Levinson, solicitor, of West Hartlepool, was married on 30th December, 1953, to Miss June Moyra Eppel, of Liverpool.

After over thirty-three years' service as clerk to the Faringdon, Berks, magistrates, Mr. Harry Cecil Rose has retired. The magistrates have presented him with a pair of "bird-watching" binoculars.

In the New Year's Honours Mr. Edmund Alliston Wingrove, of 59 Shepherd's Lane, Beaconsfield, has been awarded the M.B.E. This honour has been awarded to him in recognition of the fact that for more than seventy-eight years he served continuously in the office of Baily Gibson & Co., solicitors, of Beaconsfield. He continued to do a full day's work until he retired at the end of September, 1953, at the age of 94. In

addition to his work for his firm he acted as assistant clerk to the justices at Beaconsfield and Burnham, as deputy steward of the Manor of Chalfont St. Peter, as manager of the Beaconsfield Church Schools and as clerk to the Beaconsfield Charity Trustees. He also acted for many years as a sidesman at the Parish Church.

Miscellaneous

THE SOLICITORS ACTS, 1932 TO 1941

On 17th December, 1953, an Order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that there be imposed upon ALFRED HENRY WHITWAM, of National Provincial Bank Chambers, Mexborough, Yorkshire, a penalty of one hundred pounds (£100) to be forfeit to Her Majesty, and that he do pay to the complainant his costs of and incidental to the application and inquiry.

DEVELOPMENT PLANS

CITY OF CARLISLE DEVELOPMENT PLAN: AMENDMENT

Application was made to the Minister of Housing and Local Government on 22nd December, 1953, for an amendment to be made to the approved development plan so far as the same relates to the Devonshire Walk Area of the City of Carlisle. The proposed amendment is that the Devonshire Walk Area shall be defined as an area of comprehensive development and designated for compulsory purchase. A certified copy of the amendment as submitted for approval has been deposited for inspection at the Town Clerk's Office, Fisher Street, Carlisle. The copies or extracts of the amendment to the plan so deposited are available for inspection free of charge by all persons interested at the address mentioned above between 9 a.m. and 5.30 p.m. from Monday to Friday. Any objection or representation with reference to the proposed amendment to the approved plan may be sent in writing to the Secretary, Ministry of Housing and Local Government, Whitehall, London, S.W.1, before 13th February, 1954, and any such objection or representation should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the Carlisle City Council at the City Surveyor's Office, 18 Fisher Street, Carlisle, and will then be entitled to receive notice of the eventual approval of the plan.

MONTGOMERYSHIRE DEVELOPMENT PLAN

The Minister of Housing and Local Government has approved with modifications the development plan for the County of Montgomeryshire. The plan, as approved, will be deposited in the Council Offices, Welshpool, for inspection by the public.

HUNTINGDONSHIRE DEVELOPMENT PLAN

The Minister of Housing and Local Government has approved with modifications the development plan for the County of Huntingdonshire. The plan, as approved, will be deposited in the Council Offices, Huntingdon, for inspection by the public.

The Northcote-Trevelyan Report Centenary Lecture on "The Civil Service in the Constitution" will be given by Professor K. C. Wheare, C.M.G., M.A., F.B.A., Gladstone Professor of Government and Public Administration in the University of Oxford and Fellow of All Souls College, at the University of London Senate House (entrance from Russell Square or Malet Street, W.C.1) at 5.30 p.m. on Tuesday, 16th February, 1954. The chair will be taken by the Chancellor of the Exchequer, the Rt. Hon. R. A. Butler, M.A., LL.D., D.C.L., F.R.G.S., M.P. The lecture is addressed to students of London University and to others interested in the subject. Admission is free and without a ticket.

OBITUARY

MR. J. C. BABINGTON

Mr. John Cyril Babington, solicitor, of Hull, died recently, aged 72. He was admitted in 1905.

MR. J. N. BAILEY

Mr. John Norman Bailey, solicitor, of Chancery Lane, London, W.C.2, died on 29th December, aged 77. Admitted in 1902, he retired only a few days before his death.

MR. T. BELK

Mr. Thomas Belk, retired solicitor, and clerk to the Middlesbrough magistrates for fifty-two years before his retirement, died recently, aged 86. He was admitted in 1891.

MR. H. H. BELL

Mr. Henry Herbert Bell, solicitor, of Liverpool, died recently, aged 84. He was admitted in 1892.

MR. H. D. BRIGHT

Mr. Horace Dickinson Bright, solicitor, of Nottingham, died on 26th December, aged 72. Admitted in 1904, he was president of the Nottingham Law Society in 1939.

MR. F. H. J. S. CHURCHILL

Mr. Frederick Herbert John Salisbury Churchill, M.A., solicitor, died on 25th December, 1953, aged 75.

COL. C. E. EDWARDS

Colonel Cyril Ernest Edwards, D.S.O., M.C., T.D., D.L., J.P., solicitor, of Billericay, Essex, died recently, aged 63. He was a Deputy Lieutenant for Essex, and was a member of the Central Council of the Magistrates' Courts Committees. He was a General Commissioner of Taxes and chairman of the Licensing Committee for Southend County Borough. He was admitted in 1915.

MR. C. O. GRINDROD

Mr. Charles Oswald Grindrod, solicitor, of Liverpool, died on 30th December, 1953. He was admitted in 1899.

MR. A. J. HATWELL

Mr. Alfred John Hatwell, solicitor, of Birmingham, died on 18th December, aged 68. He was admitted in 1912.

MR. A. H. JACKSON

Mr. Arthur Harding Jackson, solicitor, of Rotherham, died on 16th December, aged 67. Admitted in 1908, he retired from the office of Clerk to the Rawmarsh Council in 1951, after occupying the post for thirty years.

SIR GILBERT McILQUHAM

Sir Gilbert McIlquham, solicitor, of Cheltenham, died on 26th December, aged 90. For many years he was clerk to the Cheltenham Rural District Council, but in 1923 relinquished that position and was elected chairman, a post he held for thirteen years. He was elected an alderman of Gloucestershire County Council in 1934 and was knighted in 1937. He was admitted in 1886.

MR. L. E. MOON

Mr. Leslie Ernest Moon, deputy clerk to Chanctonbury Rural District Council, died on 1st January, aged 42.

MR. A. F. W. OGILVIE

Mr. Alan Freeman Walker Ogilvie, solicitor, formerly of London, W.C.2, died on 23rd December, aged 80.

MR. G. J. STRICKLAND

Mr. George John Strickland, retired solicitor, of Bloomsbury Square, London, W.C.1, died on 21st December, aged 82. He was admitted in 1893.

MR. R. G. THORP

Mr. Robert Gordon Thorp, solicitor, of Brighton, died on 23rd December, aged 68. He was admitted in 1908.

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